IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 49

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

vs.

KATHARINE F. LENROOT, Chief of the Children's Bureau, United States Department of Labor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the circuit court of appeals (R. 34) is reported in 141 F. (2d) 400. The opinion of the district court (R. 16) is reported in 52 F. Supp. 142.

Jurisdiction

The opinion of the circuit court of appeals was handed down March 3, 1944 (R. 34) and the judgment was entered March 20, 1944. (R. 39) The petition for certiorari was filed April 5, 1944 and was granted May 8, 1944. (R. 41)

The jurisdiction of the court is invoked under section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925 (28 U. S. C. A. section 347).

Questions Presented

Do the child labor provisions of the Fair Labor Standards Act apply to telegraph companies? Specifically, may a telegraph company which employs messengers under sixteen to pick up and deliver telegrams in the ordinary course of its business be enjoined from transmitting any interstate or foreign messages until thirty days after such employment has ceased?

Statutes Involved

The statutes involved are set forth in the Appendix to this brief.

Statement of the Case

The Fair Labor Standards Act was passed June 14, 1938. Petitioner, which will be referred to as Western Union, operates in all the States and necessarily employs many thousands of telegraph messengers. Many of these messengers are and many always have been under sixteen. The ratio changes from day to day, but as of March 31, 1943 the proportion of messengers under sixteen was 11.14 per cent (R. 11-12). Some messengers under eighteen have been employed to drive motor vehicles while picking up or delivering telegrams, which employment is "oppressive" child labor under child labor order No. 2.* The proportion of these to the total number of messengers was, as of March 31, 1944, .33 of one per cent (R. 12).

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* Title 29, chapter 4, Code of Federal Regulations, part 422, section 422.2 (R. 25-28).

Western Union's position has always been that the child labor provisions of the act were not intended to apply to telegraph companies, and accordingly the enactment of the act made no difference in its practices with respect to the employment of messengers. Four years after the passage of the act, in August 1942, the plaintiff brought this civil suit, claiming that Western Union was violating the act by transmitting messages in commerce while employing child labor, and seeking an injunction (not against the employment of the child labor, to which plaintiff concedes that she is not entitled, but) against continuing to transmit the messages.

Both sides moved for summary judgment. Plaintiff's motion was granted by the district court (Judge RIFKIND) and the judgment affirmed by the circuit court of appeals.

The Prohibition Which Western Union Is Supposed to Have Violated

The act does not prohibit the employment of child labor in commerce. It provides that:

> "* * * no producer * * * shall ship or deliver for shipment in commerce any goods produced in an establishment * * * in or about which, within thirty days prior to the removal of such goods therefrom, any oppressive child labor has been employed; * * *" (section 12a; 29 U. S. CA section 212a.)

The employment of messengers under sixteen, and the employment of motor messengers under eighteen, are "oppressive child labor" within the definition of the act. The defendant's position is that it is not a producer, that its messages are not goods, and that in any event they cannot be said to be shipped in commerce.

Nature of the Telegraph Business

The facts were stipulated (R. 6-12) and there is no dispute about any of them or any of the inferences from them. The nature of the telegraph business is so well known, and it has been so frequently considered by this court, that it is probably superfluous to make any extended statement about the facts, or to burden the court with record references to them. The statement as to the facts in the opinion of the circuit court of appeals (R. 36), while not entirely accurate in all respects, is sufficiently so for the purposes of this discussion; but it may be convenient to summarize them very briefly:

The sending of a telegram is a short story, and like all good short stories it has a beginning, a middle and an end. The beginning is when the message is accepted by the telegraph company for transmission and delivery; the middle is the transmission of the thought, or idea, or intelligence contained in the message by means of electrical impulses from the telegraph office of origin to the telegraph office of destination; the end is when the thought, idea or intelligence is delivered or communicated to the addressee.

The beginning: messages are given to a telegraph company (in telegraph language "filed" at the telegraph office of origin) in various ways. The sender or his agent may hand the written message across the counter to a telegraph clerk; he may send it to the telegraph office by one of the company's messengers, summoned by a signal sent over a call-box circuit or by telephone; he may telephone it directly to the telegraph office, where it is received and written down or typewritten by an agent of the company; or if he has a private wire connecting his office with the telegraph office (a "pony" wire, or "tie-line") the sender's operator may transmit the message by Morse or printer over this private wire and it will be received in the telegraph office by an operator employed by the company who makes a written or typewritten copy of it; or the copy in the tele-

graph office may be made by a printing telegraph machine (teleprinter or teletypewriter). Whatever method is employed the first written or printed or typewritten copy of the message to appear in the telegraph office of origin is the *original message*, which the telegraph company is required by law to preserve for a definite time, and which determines what it is that the telegraph company assumes the obligation to transmit and deliver. The physical piece of paper on which this message is written does not move from place to place, but is retained in the telegraph office of origin.

The middle: the thought, idea or intelligence contained in the original message is communicated (in telegraph language "sent" or "transmitted") by electrical impulses passing over a wire or circuit to the telegraph office of destination, or to one or more intervening telegraph offices known as "relay" offices. It may be sent by a Morse operator, making and breaking the electric contact by elevating and depressing a key, and received at the next office by a Morse operator reading the message by sound from the short and long clicks (dots and dashes) proceeding from the sounder. Or the sending operator may operate a "printer", as one operates a typewriter, and the message may be received at the next office by a corresponding mechanical device which prints it on a blank or a tape. Or the message may be translated at the sending office into symbols or "pulses" represented by perforations on a tape, and the tape may be fed into an automatic sending machine, coming out of a corresponding automatic receiving machine at the other end, also on a tape. If it is necessary to relay the message at more than one intervening office, the operation is repeated at each such office. The copy of the message at each such office is known as that office's "relay copy". Like the original message these relay copies do not move, but remain in the respective relay offices.

The end: when the message reaches the telegraph office of destination—the nearest office to the addressee—the copy

made at that office, in any of the various ways described, whether by hand, by printer, or on a tape, is delivered or communicated to the addressee in various ways corresponding to the ways in which the original message may reach the office of origin. The normal procedure is to take the received copy, written on a receiving blank (or cut and pasted on a receiving blank if it comes in by tape), enclose it in a sealed envelope and send it to the addressee's place of business or residence by messenger. It may however be read to the addressee over the telephone, or transmitted to him by pony wire or tie-line; or if he has so instructed it may be held at the telegraph office until the addressee calls for it. But the normal method is delivery by messenger. This received copy of the message, which a messenger carries for a distance varying from a few yards to a mile or more and hands to the addressee, is the only one of all the physical pieces of paper on which the message is copied in the various stages of its transmission which has the property of motion. Except in very rare instances, as where the office of destination is in a city through which a State line runs and the telegraph office is on one side of the line and the addressee on the other, this piece of paper does not move across State lines. Nothing in connection with the message moves across State lines normally except the electrical impulses into which the message is converted at each office which sends it and out of which it is reconverted at each office which receives it.

Thus it is seen that no physical thing is entrusted to the telegraph company by the sender, to be preserved in specie by the company and in specie delivered to the addressee. The thing entrusted to the telegraph company by the sender, which is to be preserved by the company unchanged and communicated to the addressee, is the thought, idea or intelligence contained in the message; and this is something which, apart from any artificial definitions, and according to the ordinary meaning of language, is produced by the sender and not produced by the telegraph company at all.

Specifications of Error Relied On

The circuit court of appeals erred in holding:

1. That Congress, by the child labor provisions of the Fair Labor Standards Act, intended to require telegraph companies to stop employing messengers under sixteen.

2. That telegrams are "goods" within the meaning of that act.

3. That a telegraph company is a "producer" within the meaning of that act.

4. That telegrams are "shipped" in commerce within the meaning of that act.

5. That Western Union should be enjoined from sending or delivering interstate telegrams for thirty days.

ARGUMENT

I

Although urged to do so Congress refused to declare any national policy with respect to child labor, to prohibit child labor in commerce, or to supersede state regulation with any uniform national rule; it decided merely to renew its earlier attempt to prevent the use of child labor from resulting in unfair competitive advantage in interstate trade.

In 1937 the child labor Amendment had failed of ratification, and was believed by many to be dead or at least in extremis. At any rate, if it was still alive, there was no prospect of its early ratification.

Advocates of the Amendment therefore sought legislation from Congress which would have the effect of putting

an end to child labor to the full extent of the power of Congress under the Constitution without the Amendment, and perhaps a little beyond. Their reasons and motives were well known. Opponents of the Amendment were also opposed to such an extension of national regulation into that field, for the same reasons in general which had led them to oppose the Amendment. Their attitude and these reasons were equally well known.[1] The debates on the subject had been heated, and had been conducted on a nation-wide scale, for more than fourteen years.

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[1] For convenience the principal reasons advanced may be summarized (the references are to back issues of the NEW YORK TIMES, available in bound form at the Columbia University School of Journalism):

Unjustifiable interference with rights of States, which have not been neglectful of their obligations:

May 30, 1924, page 30, col. 3, SENATOR WADSWORTH of New York;

August 18, 1924, page 16, col. 3, JAMES A. EMERY, General Counsel, National Association of Manufacturers;

December 5, 1924, page 13, col. 1, New York State Chamber of Commerce;

December 12, 1924, page 39, col. 1, GOVERNOR MCLEOD of South Carolina.

Unnecessary to clothe the Federal Government with such immense powers; dread of further increase of power of already top-heavy Federal government; would tend toward centralized bureaucratic control:

Nov. 22, 1924, page 20, col. 1, National Grange;

Feb. 1, 1925, page 24, col. 1, JOSEPH T. CASHMAN, Esq., of the New York Bar, in debate at National Republican Club;

Feb. 6, 1925, page 14, col. 1, LOUIS MARSHALL, Esq., in debate at Women's National Republican Club;

Oct. 12, 1926, page 2, col. 6, SENATOR WADSWORTH of New York, explaining vote against ratification;

Oct. 30, 1926, page 5, col. 3, MR. EMERY, Counsel of National Association of Manufacturers: "no justification for the demand and the national Legislature is not fitted for the task of meeting a local problem in terms of local conditions".

The Democratic Platform of 1936

No doubt because of the divergence of views within as well as without the party, the platform contained no promise of any national prohibition of child labor. All that was said was this:

> **"We know that droughts, dust storms, floods, minimum wages, maximum hours, child labor and working conditions in industry, monopolistic and unfair business practices cannot be adequately handled exclusively by forty-eight separate State legislatures**

Unjustifiable interference with rights of parents:
Dec. 7, 1924, page 19, col. 2, NICHOLAS MURRAY BUTLER.
Detrimental to youth and real hardship to farmers:
Nov. 13, 1924, page 24, col. 1, National Grange opposes amendment.

In *"The Federal Child Labor Amendment"* by WILLIAM D. GUTHRIE, Esq. (New York, April 1934), it is pointed out that every State in the Union has legislated on the subject of child labor, and that "Such legislation varies as local self-government will inevitably vary throughout the United States because of climate, public policy, standards of living, resources, living costs, prevailing wage scales, taxes, etc."; and there are many quotations from statesmen in and out of Congress who had indicated their strong opposition to abolishing these variations and imposing a uniform national rule.

In his companion pamphlet *"The Child Labor Amendment"* (New York, March 1934), he quotes the following colloquy from a Senate debate on May 31, 1924:

> "SENATOR KING of Utah: Of course, it is obvious that under the guise of the amendment they will in time take charge of children the same as the bolsheviks are doing in Russia and control not only their labor and their education, but after a time determine whether they shall receive religious instruction or not, the same as the bolsheviks do in Russia. * * *
>
> "SENATOR REED of Missouri: * * * Something has been said today about some manufacturers being against it. I would like to ask him what he knows about people being in favor of the pending measure who believe in the Russian bolshevik idea of the State taking charge of the children?
>
> "MR. KING: If the Senator from Delaware will pardon me, every bolshevik * * * in the United States is back of the measure."

> * * *. Transactions and activities which inevitably overflow State boundaries call for both State and Federal treatment.
>
> "We have sought and will continue to seek to meet these problems with legislation within the Constitution. If these problems cannot be effectively solved by legislation within the Constitution, we shall seek such clarifying amendment as will assure to the legislatures of the several States and the Congress of the United States, each within its proper jurisdiction, the power to enact those la[illegible]hich the State and Federal legislatures, wit[illegible]ective spheres, shall find necessa[illegible]

The President's Message of May 24, 1937

The President said that the time had arrived to take further action to extend the frontiers of social progress which, he said, had in actual practice "been effectively advanced only by the passage of laws by State legislatures or the national Congress". He did indeed say that "A self-supporting and self-respecting democracy can plead no justification for the existence of child labor"; but he did not recommend or suggest that Congress, as distinguished from the State legislatures, should undertake to deal with that subject by a uniform national prohibition. On the contrary his recommendation with respect to child labor was strictly limited:

> "Nearly twenty years ago in his dissenting opinion in *Hammer* v. *Dagenhart*, Mr. Justice HOLMES expressed his views as to the power of Congress to prohibit the shipment in interstate or foreign commerce of the products of the labor of children in factories. * * * A majority of the Supreme Court, however, decided five to four against Mr. Justice HOLMES. * * * But although Mr. Justice HOLMES spoke for a minority of the Supreme Court he spoke for a majority of the American people. * * * Congress cannot interfere in local affairs, but when goods pass through the channels of commerce from one State to

another they become subject to the power of Congress, and Congress may exercise that power to organize and protect the fundamental interests of free labor. And so to protect the fundamental interests of free labor and a free people we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. * * * There should be no difficulty in ruling out the products of the labor of children from any fair market."

Legislative History of the Child Labor Provisions of the Fair Labor Standards Act

Companion bills, known as the Black-Connery bills, were simultaneously introduced in the Senate and the House in May 1937, promptly after the receipt of the President's message. These bills commenced with a "legislative declaration" that the employment of workers under sub-standard labor conditions burdened and obstructed commerce and led to labor disputes obstructing the free flow of goods in commerce. "Sub-standard labor condition" was defined as including a condition of employment at sub-standard wages or for a sub-standard work week, or in which "oppressive child labor exists". Any goods in the production of which employees had been employed under any sub-standard labor condition were "unfair goods". The bills prohibited the shipment in commerce of any unfair goods, and prohibited the employment in commerce or in the production of goods intended for transportation or sale in commerce of any person under any sub-standard labor condition (section 7).

It will be noted that so far as child labor is concerned these bills dealt with the subject in three ways: (1) by legislative declarations that child labor threatened obstructions to commerce; (2) by a direct prohibition of the employment of child labor in commerce, and (3) by a prohibition of the shipment in commerce of goods produced by child labor. As will be seen, in the act as finally passed only (3) survived.

The Action of the Senate on the Black Bill

The Senate acted first. On July 6 (calendar day July 8), 1937 Mr. BLACK, from the Committee on Education and Labor, reported favorably on the bill, which was S 2475, with certain amendments not now material, and recommended that it do pass. However, the Senate Committee on Interstate Commerce, of which Senator WHEELER was Chairman, had been conducting for some time an exhaustive investigation into the subject of child labor, and in that connection had considered six different bills and had held lengthy hearings on the subject. Senator WHEELER said:

> "We heard representatives of the different churches, representatives of the Episcopal Church, I think of the Methodist Church, of the Jewish race, and of the Catholic denomination. We heard representatives of the brotherhoods and representatives of the employers. We finally worked out a bill which was satisfactory to practically everybody except the Children's Bureau."[2]

The bill on which the Interstate Commerce Committee had agreed, and which it had recommended for passage,[3] was S 2226, "regulating the products of child labor in interstate commerce". Like the Black bill it prohibited the shipment in commerce of goods produced by child labor; but unlike the Black bill it contained no prohibition of the employment of child labor in commerce. When the vote was taken on the passage of the Black bill on July 31, 1937 Senator JOHNSON moved that it be amended to strike therefrom all provisions relating to child labor, and that the Wheeler-Johnson bill (S 2226) as amended by the Committee on Interstate Commerce be inserted at the end of section 23 of the Black bill (S 2475).[4] This amendment

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[2] Cong. Rec. July 31, 1937. Vol. 81, Part 7, pages 7930-7931.

[3] Senate Report No. 726, 75th Congress, 1st Session.

[4] Cong. Rec. Vol. 81, Part 7, pages 7949-7950.

was agreed to by the Senate (yeas 57, nays 28, not voting 10).[5] The Senate rejected a motion to recommit the bill to the Committee on Education and Labor,[6] and the bill was then passed.[7]

The Senate bill as passed not only contained no prohibition of child labor in commerce but contained no legislative declaration that child labor threatened to burden or obstruct commerce. The language of the legislative declaration was not changed; it was still declared that the employment of workers under sub-standard labor conditions burdened and obstructed commerce; but in the definition of "sub-standard labor condition" the reference to child labor is omitted and the term is narrowed to include only wages and hours.

Action of the House

The House struck out all the provisions of the Senate bill after the enacting clause and substituted its own bill, which was the original Connery bill with numerous amendments. Mrs. NORTON, Chairman of the Labor Committee, stated that these amendments numbered 159.[8] On December 17, 1937 it was recommitted to the House Labor Committee, redrafted by that committee, but denied a rule by the Rules Committee.[9] On May 23, 1938 the Rules Committee was discharged from further consideration of the bill,[10] a House motion to recommit the bill was lost,[11] and the bill as thus redrafted was then passed by the House (May 24) and sent to the Senate as an amendment to the Senate bill.[12]

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[5] Cong. Rec. Vol. 81, Part 7, pages 7949-7951.
[6] Cong. Rec. Vol. 81, Part 7, page 7954.
[7] Cong. Rec. Vol. 81, Part 7, page 7957.
[8] Cong. Rec. Vol. 82, Part 2, page 1829.
Cong. Rec. Vol. 83, Part 7, pages 7275, 7279.
[9] Cong. Rec. Vol. 82, Part 2, pages 1829, 1835.
Cong. Rec. Vol. 83, Part 7, page 7275.
[10] Cong. Rec. Vol. 83, Part 7, pages 7274-7279.
[11] Cong. Rec. Vol. 83, Part 7, page 7449.
[12] Cong. Rec. Vol. 83, Part 7, page 7450.

The Senate refused to agree to the House amendment and asked for a conference,[13] which was agreed to.[14]

As passed by the House the bill still contained the prohibition against child labor in commerce and the prohibition against shipment in commerce of child-labor goods, expanded now to include all goods produced in an establishment where child labor had been employed within thirty days, whether child labor had been employed in the production of the specific goods or not; but although the finding and declaration of policy still recited that sub-standard labor conditions burdened and obstructed commerce there was no longer any definition of sub-standard labor conditions, so that although child labor in commerce was prohibited there was nothing which directly hooked up this prohibition with the finding and declaration of policy.

The Conference Report

Meanwhile the Senate, to emphasize its determination to enact into law its own views on the subject of child labor, passed the Wheeler-Johnson bill, S 2226, as it had been recommended by the Interstate Commerce Committee, as a separate measure on August 19, 1937.[15] The Conference Committee wrote a compromise bill which was passed by both houses without further amendment.[16] The results, so far as child labor was concerned, were these:

(1) The finding and declaration of policy omitted all reference to sub-standard labor conditions, and did not

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[13] Cong. Rec. Vol. 83, Part 7, page 7560.

[14] Cong. Rec. Vol. 83, Part 7, page 7770.

[15] Cong. Rec. Vol. 81, Part 8, page 9320. Senator WHEELER said: "I may say that this bill passed the Senate by a very large majority as an amendment to the wage and hour bill. The wage and hour bill is now tied up in some committee in the House; and the bill in question, to regulate interstate commerce in the products of child labor, should, it seems to me, be passed." Vol. 81, Part 8, page 9318.

[16] Cong. Rec. Vol. 83, Part 8, pages 9178, 9267.

mention child labor. Congress declared that commerce was burdened and obstructed by

> "the existence, in industries engaged in commerce or the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."

(2) The prohibition of child labor in commerce, on which the House was insisting and which the Senate had refused to enact, was left out.

(3) The Senate, not being confident that *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918), would be overruled,[17] sought to hedge against the possibility that it might not be by providing for the branding of products of child labor when shipped in commerce and for their subjection to the laws of the States of destination even in the original package. The House, considerably influenced no doubt by the opinion of Attorney General JACKSON, was confident that *Hammer* v. *Dagenhart* would be overruled, and thought these precautions unnecessary. The Senate bill, instead of prohibiting the shipment in commerce of all goods produced in an establishment where child labor was employed, which it was thought might be unconstitutional, merely created a presumption that goods produced in a child-labor establishment were themselves produced by child labor.[18] With

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[17] "Thus, in the judgment of the committee, too much hope could not be practically entertained that the Supreme Court would overrule the *Hammer* v. *Dagenhart* case at this time". Report of Committee on Interstate Commerce on S 2226 (the Wheeler-Johnson bill); Senate Report No. 726, 75th Congress, 1st Session.

[18] The report of the Interstate Commerce Committee on S 2226, *supra*, said: "Because S 2345 absolutely denied the uses of interstate commerce facilities for goods which demonstrably are not tainted by child labor, though they may have been produced by a concern employing in some department thereof child labor, a problem of constitutional law is raised (*Tyson and Bros.* v. *Banton*, 273 U. S. 418, 1927; and *Adams* v. *Tanner*, 244 U. S. 590, 1917) which S 2226 avoids."

respect to these matters the Conference Committee apparently thought that the Senate's fears were groundless, and adopted the provisions of the House bill. This is evidently what the Conference Report meant when it stated, under the head of "Child Labor Provisions", that the conference agreement "adopts the child labor provisions of the House amendment, with one exception". The one exception was the prohibition of child labor in commerce.

Reasons Why Senate Refused to Agree to a Prohibition of Child Labor in Commerce

Perhaps the reasons are not material. The issue was squarely raised. The House to the last continued to contend for the prohibition; the record shows that the Senate, from the day of the first vote on the Black bill, refused to have it and consistently adhered to the refusal. The Conference Committee sustained the Senate; both houses passed the bill recommended in the Conference Report, and the intention of the Senate, whatever the reasons for it, indisputably became the intention of Congress.

Furthermore, whatever the reasons, and even if it could be assumed, contrary to the record, that the omission of this provision was an inadvertence, a national policy cannot be established by an inadvertent failure to declare it.

But there was certainly no inadvertence. The story is not told by the discussion on the floor of the Senate immediately preceding the enactment of the bill on July 31, 1937. It is found in the minutes of the hearings before the Committee on Interstate Commerce on S 592, S 1976, S 2068, S 2226 and S 2345, 75th Congress, 1st Session (1937)—that is, the hearings on the Wheeler-Johnson bill and its companion bills. At those hearings representatives of labor insisted that the legislation contemplated "is not to be compared with a direct prohibition of the employment of children under sixteen years of age in industrial establish-

ments * * *" (page 182; and see also page 171; pages 77, 124).

The plaintiff's position below was that she does not know why Congress refused to enact this prohibition. The circuit court of appeals says that it does not know.[19] We suggest that there were at least four reasons why a majority could not be obtained in the Senate to vote for the prohibition:

First Reason:

The constitutional difficulty

The report of the Interstate Commerce Committee on the Wheeler-Johnson bill, S 2226,[20] said that "precedent definitely labels the direct prohibition approach as unconstitutional" (page 3). However the matter may stand today, there was certainly nothing frivolous about such a belief in 1937. While Congress had been frequently sustained in prohibiting the shipment of this or that commodity in commerce, any direct attempt to interfere with the employer-employee relation had been sustained, as against objection under the Fifth Amendment, only when the regulation bore some reasonable relation to safety,

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[19] The court says: "It must be admitted that it is not clear * * *" etc. (R. 38-39).

[20] Senate Report 726, 75th Congress, 1st Session. Senator BARKLEY said during the hearings: "I think all we can do is to prohibit the shipment in interstate commerce of child-made goods, but that does not deal with the large quantities of goods that may be made in the States, over which we have no jurisdiction without the Amendment." There was much discussion of the possibility of prohibiting child labor except under work permits to be issued by Federal authority. Senator LONERGAN said (page 77): "It is only through a constitutional amendment that we can deal effectively with this subject"; the Chairman said (page 124): "There is this question under any Federal law, in my judgment, without a constitutional amendment, and that is, as to whether or not the courts would uphold the provisions giving the Federal Government the right to issue any work permit. I think that would be questioned." (Minutes of the Committee Hearings, page 15.)

economy or efficiency.[21] Economy here was out. The "general welfare" was out.[22] There had been no history of strikes or other labor disturbances, actual or threatened, by reason of child labor, and it may well have seemed that Congress could not, without stultifying itself, find as a fact that child labor had any tendency to burden or obstruct commerce by interruptions. At any rate the finding to this effect in the original Black-Connery bills was omitted in the bill that passed the Senate, modified out of all recognition in the bill that passed the House, and did not appear at all in the act which finally went through. In the absence of any such finding it might well have been supposed in 1938 if not today that a prohibition of all child labor in commerce was beyond the power of Congress.

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[21] The first Hours of Service of Railway Employees Act was sustained on the ground of safety, *MK&T Railroad* v. *U. S.*, 231 U. S. 112 (1913). So as to the Safety Appliance Act, and the second Employer's Liability Act, 223 U. S. 1 (1912). The Labor Board Cases, 301 U. S. 1-148 (April 12, 1937) sustained the Wagner Act as tending to prevent interruptions to commerce: even the editorial writers of the Associated Press were held properly included in the act for that reason: "We think, however, it is obvious that strikes or labor disturbances among this class of employees would have as direct an effect upon the activities of the petitioner as similar disturbances amongst those who operate the teletype machines or as a strike amongst the employees of telegraph lines over which petitioner's messages travel" (page 129). The emergency legislation sustained in *Wilson* v. *New*, 243 U. S. 332 (1917), establishing an eight-hour day and minimum wages for railroad employees to prevent a general railroad strike, was also sustained as tending to prevent interruptions. The first Railroad Retirement Act, 295 U. S. 330 (May 1935) was held invalid by five to four on the ground that it had no reasonable relation to safety, economy or efficiency: the dissenting minority agreed with the test, and differed from the majority only because of their belief that the test was met.

[22] *Railroad Retirement Board* v. *Alton Railroad*, 295 U. S. 330 (1935); *Carter* v. *Coal Company*, 298 U. S. 238 (1936).

Second Reason:

Objections to the principle involved in the child labor Amendment

For varying reasons, in some cases overlapping, the same Senators who opposed the child labor Amendment would naturally have opposed any attempt to induce Congress to supersede State authority and subject child labor to a uniform Federal rule. These reasons have already been briefly summarized (*supra*, p. 8 note). They were not repeated and debated immediately preceding the vote by which the Senate substituted the provisions of the Wheeler-Johnson bill for the child labor provisions of the Black bill. It was not necessary that they should be; they were too well known; they had often been explained before. And the population of the States opposed to the Amendment was (in 1940) over 58,000,000.

Third Reason:

Fear that direct prohibition would definitely kill the child labor Amendment

Singularly enough, some Senators who favored the Amendment joined those who did not in opposing the direct prohibition of child labor. Some Senators at least believed that there was still a possibility that the Amendment might be ratified. Their position was that they did not wish to do anything which might interfere with that possibility. The following is quoted from the hearings before the Committee on Interstate Commerce on S 592, S 1976, S 2068, S 2226 and S 2345, 75th Congress, 1st Session (1937):

> "SENATOR BARKLEY: If we are going to pass a law, I want it to be the best law we can get, and I want to say, in this connection, that I am not convinced, as a matter of technic, that it is wise to pass any law just now. I am not so certain but what any law passed on the subject might lull the people into the belief that

we had done something effective, and thereby retard the effort to get the additional eight States required to ratify the amendment. I think the ratification of the child-labor amendment is infinitely more important than the passage of any law we can enact at this session of Congress.

"MR. KEATING: I agree with you 100 per cent.

"SENATOR BARKLEY: I say that in spite of the fact that I have introduced a bill on the subject. I would oppose my own bill if I felt that its enactment into law would lull the American people into a feeling of security, that we had done something that made unnecessary the ratification of the child-labor amendment.

"That is where I stand on the whole subject. I would rather wait 2 or 3 years to get the child-labor amendment ratified than to pass the best law we can pass here dealing with interstate commerce that might result in the ultimate defeat of the child-labor amendment. I want to make that statement because that is my settled conviction on the subject.

"THE CHAIRMAN: Assuming, for the sake of argument, that you can pass a law that would prohibit child-labor goods being shipped from one State to another, and it was held constitutional by the Supreme Court, that certainly would not eliminate the necessity of having the amendment.

"SENATOR BARKLEY: I agree with you" (page 15).

Fourth Reason:

The prohibition was unnecessary if *Hammer* v. *Dagenhart* should be overruled; and if it should not be the prohibition may well have been thought undesirable

There was practically unanimous agreement that the shipment of child-labor goods in commerce should be prohibited if this court would sustain the prohibition. In this respect Congress merely adhered consistently to the attitude which it had taken twenty years before and which had

never changed. The purpose would be accomplished if this court should change its mind; and in that event there was no reason for any further attempt by Congress to deal with the subject of child labor. The Democratic platform had not promised anything further, nor had the President recommended anything further.

On the other hand, if *Hammer* v. *Dagenhart* were still to be the law, what useful purpose could be served by a prohibition of child labor in commerce? There had been a history of abuses and many complaints about child labor in mines, factories and workshops; there had been no such history and so far as we know no such complaints that boys were being oppressed by permitting them to serve as telegraph messengers or as office boys in banks or in the headquarters offices of interstate carriers. So far as the telegraph messenger was concerned, the profession had been idealized and romanticized by HORATIO ALGER, JR. in "*The Adventures of a Telegraph Boy*"[23] to such a point that to many an American lad it was his second choice of a start in life—the next best thing to being a cowboy. In this classic the hero foils a burglar, displays resourcefulness and courage on many occasions, and after a year or two of service in the telegraph office makes a contact with a customer which leads to a position at three times his messenger salary.

The situation confronting Congress in this respect was not unlike that which this court considered in connection

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[23] David McKay, Philadelphia, 1889: "The life of a telegraph boy is full of variety and excitement. He never knows when he goes to the office in the morning on what errands he may be sent, or what duties he may be called upon to discharge. He may be sent to Brooklyn, or Jersey City, with a message—sometimes even farther away. He may be detained to supply the place of an absent office boy, or sent up to [illegible]n to go out and walk with a child. In the evening he may be directed to accompany a lady to the theater as escort. These are a few of the uses to which telegraph messenger boys are put" (p. 22). It was general knowledge that EDISON and CARNEGIE had started life as telegraph messengers. So had two Western Union presidents and a considerable proportion of the higher officials of both telegraph companies.

with the income tax law which was held unconstitutional in its entirety in *Pollock* v. *The Farmers Loan and Trust Company*, 158 U. S. 601, 636, 637 (on rehearing, 1895). The income tax if confined to wages and earnings would have been a perfectly valid excise; but in answer to the suggestion that it should be sustained so far as Congress had power to enact it this court concluded that if Congress had known that it could not tax rents and bond interest it would not have wished to tax wages.

That some Senators at least may have been opposed to the prohibition of child labor in commerce for this reason is not mere speculation. The report of hearings before the Committee on Interstate Commerce of the Senate in connection with the Wheeler-Johnson bill and the other child labor bills, held on May 12, 18 and 20, 1937, 75th Congress, 1st Session, contains the following (page 99). The Chairman (Senator WHEELER) was questioning Mr. DINWIDDIE, General Secretary of the National Child Labor Committee, regarding the employment of children under eighteen in "extra hazardous" employments:

> "THE CHAIRMAN: Suppose you said that you should prohibit all children under 18 from working for any mining company. They might be engaged in office work, or they might be engaged in surface work, or they might be engaged as messenger boys.
>
> "You do not think that a boy of 16 could not do some of that work. Do you not think it would be better for him to be engaged in doing some work of that kind rather than running around the streets?
>
> "If his parents do not or cannot send him to school, would it not be better for him to be engaged in some useful occupation rather than playing around the streets? After all, we want to look at it as a practical proposition. We do not want to do the children of the country a lot of harm when they are trying to do them good."

The case is not affected by the fact that the conference report did not state fully or accurately the reasons for omitting the prohibition of child labor

As we have already pointed out the Conference Report stated that it had adopted the child labor provisions of the House amendment (with one exception) rather than the Senate bill. The caution of the Senate had led it to insert three provisions hedging against the possibility that *Hammer* v. *Dagenhart* might still be followed; the House had thought these precautions unnecessary, and in that respect the Conference Committee had agreed with the House. But as to the "one exception", the omission of the prohibition of child labor, which the House bill had contained and the Senate had refused to agree to, the Conference Committee said in its report:

> "In view of the omission from the conference agreement of the principle of section 6 of the House amendment, subsection (b) of section 10 of the House amendment has been omitted."[24]

This statement does not, and probably was not intended to, give all the reasons for the omission of section 10b.

The House bill provision prohibiting child labor in commerce read:

> "Every employer engaged in commerce *in an industry affecting commerce* is prohibited from employing any employee under any oppressive child-labor condition."

The provisions relating to wages and hours used the same language: "No employer engaged in commerce *in an industry affecting commerce,*" and "Every employer engaged in commerce *in an industry affecting commerce.*" Section 6 directed the Secretary of Labor to determine the

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[24] HR Report No. 2738, 75th Congress, 3rd Session. June 11, 1938.

relation of the various industries to commerce and to issue orders declaring that particular industries were industries affecting commerce.

When the Conference Committee decided to do away with this function of the Secretary of Labor, it substituted, in the case of wages and hours, "who is engaged in commerce or in the production of goods for commerce" for the House language "engaged in commerce in an industry affecting commerce", and there was no reason why it should not have done the same thing with the child labor provision if it had been desired that that prohibition should be preserved.

But the fact that the Conference Report did not say in so many words that their report was a compromise, and that with respect to the direct prohibition they had yielded to the views of the Senate conferees, whereas in various other respects they had yielded to the views of the House conferees, cannot alter the obvious facts. They did not make such a statement about any other part of their report, and it is not necessary or common for a conference committee to state expressly that it is compromising. Its ordinary function is one of compromise. Everybody knew, we think, the varying reasons why a large majority of the Senate opposed the prohibition. It was not necessary and might perhaps not have been politic for the Conference Committee to restate and emphasize the differences. The leaders in both houses were anxious to pass the bill, and there was a minority which had already delayed it for a year (it was now June, 1938) and would have welcomed any opportunity to delay it still further. It seems probable that, perhaps for this reason, the House conferees consciously refrained from emphasizing the divergence of views as to the prohibition of child labor and the extent to which they had been forced to yield to the Senate. Commenting on the Conference Agreement the House managers said, with regard to the final form of the declaration of policy:

> " * * * it states * * * that the existence * * * of labor conditions detrimental to the maintenance of

> the minimum standard of living necessary for health, efficiency, and general well-being, causes the effects on commerce described * * *. It is declared to be the policy of the act to correct, and as rapidly as practicable to eliminate, these conditions in such industries *without substantially curtailing employment or earning power.* This is the policy which has guided the Congress in the prescription of the definite wage, hour, and *child labor provisions;* this is the policy which the Congress has set to guide the Administrator and the industry committees in working toward progressive improvement of labor standards." House Report No. 2738, 75th Congress, 3rd Session, page 28. (Emphasis supplied.)

It is evident that the finding and declaration in this, their final, form had nothing whatever to do with child labor, which could not be abolished without substantially curtailing employment or earning power; and the insertion of "child labor" in the foregoing quotation was purely gratuitous.

Commenting on the Conference Report when it was presented to the Senate, and in response to questions, Senator THOMAS of Utah said:

> "Neither House nor Senate yielded its convictions, but both obtained their common objective, which was to abolish traffic in interstate commerce in the products of child labor and in the products of underpaid and overworked labor."[25]

And again:

> "Q. Are there any provisions in the bill covering child labor? A. Yes; child labor is forbidden by preventing goods to be shipped in interstate commerce when produced by child labor."[26]

In other words, forbidden to that extent and to that extent only.

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[25] Cong. Rec. Vol. 83, Part 8, page 9163.

[26] Cong. Rec. Vol. 83, Part 8, page 9164.

The Senate leaders, having won their point about child labor, were doubtless no more anxious than the leaders in the House, for the reason suggested above, to prolong the discussion and thus endanger the prompt passage of the bill.

"Oppressive" Child Labor

The child labor which was to render goods unshippable for thirty days was, both houses agreed, the labor of employees under sixteen and of employees under eighteen in occupations duly determined to be hazardous. It takes several lines to say this, and some short definition was necessary in order to avoid cumbersome repetition. In the House bill and the original Senate bill "oppressive child labor" was the term used to cover this concept. In the bill that passed the Senate child labor was specially defined without the disagreeable epithet (section 24 E). But since the epithet did not enlarge the prohibitions there was no reason why the Senate conferees who opposed the prohibition of child labor should have objected to it; no doubt they were quite willing to accept the epithet in exchange for no prohibition, and so the epithet survived. In any event a national policy cannot be established by a disagreeable word in a definition.

Summary

The court below said:

> "The act was a compromise of two quite separate designs: that of the House, which was to regulate child labor by national standards; that of the Senate, which was to prevent one State from breaking down the standards of another by unregulated competition. The House won * * *."[27]

[27] 141 F. (2d) 400, 403 (1944).

It is evident from the foregoing history that the lower court's conclusion as to what happened was directly contrary to the facts. In the act as passed there is no pretense, either by way of a declaration of policy or a prohibition, that child labor is to be regulated by national standards: that was indeed the design of the House, and it was a design to which the Senate would not agree and as to which the Senate prevailed. All that was left of the child labor provisions when the act was finally passed was a prohibition of the shipment in commerce of goods produced in a child-labor establishment for thirty days after the child labor ceases; and with the exception of the thirty-day provision this is a prohibition the meaning and scope and legal effect of which have been thus described by this court in connection with goods produced in violation of the wage and hour provisions of the same act:

> "The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under sub-standard labor conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows * * *. As we have said the evils aimed at by the act are the spread of sub-standard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions * * *. Congress, to obtain its objective in the suppression of nation-wide competition in interstate commerce by goods produced under sub-standard labor conditions, has made no distinction as to the volume or amount of shipments."
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> *U. S.* v. *Darby*, 312 U. S. 100, 115, 122, 123 (1941).

Of the six differences between the Senate and the House with respect to child labor, only two were of any importance in determining whether the design of the Senate or that of the House (and the lower court has accurately stated the

difference between them) was adopted by Congress. The differences were these:

(1) The House bill prohibited child labor in commerce and the Senate bill did not.

(2) The House bill contained a finding and declaration of policy which was probably intended to apply to child labor and the Senate bill did not.

(3) The Senate bill hedged against the possibility that *Hammer* v. *Dagenhart* might not be overruled by providing that child labor goods should be branded or labeled. The House thought this unnecessary.

(4) The Senate bill also hedged against this possibility by subjecting child labor goods to the law of the State of destination in the original package. The House thought this unnecessary.

(5) The Senate bill hedged against the possibility that it might be unconstitutional to prohibit the shipment in commerce of goods not produced by child labor although produced in an establishment where other child labor was employed, and created a rebuttable presumption instead of absolutely prohibiting the shipment of any goods from such an establishment. The House thought this unnecessary.

(6) The Senate bill defined child labor without a disagreeable epithet; the House bill defined it with the adjective "oppressive".

Only the first two differences were of any importance in determining which design prevailed. On those two the Senate won. As to the remaining four, which were immaterial in determining the Congressional design, the House won, which furnished an excuse to the Conference Committee to say that they had (in general) accepted the House bill. With one exception, they said; but the final declaration of policy certainly did not apply to child labor, so there were really two exceptions, and in determining which design prevailed they were the only ones that count.

II

Since Congress did not intend a uniform national prohibition of child labor in commerce, but expressly refused to enact one or to declare any general national policy on the subject, the prohibition actually adopted must be construed in accordance with the natural and ordinary meaning of the language used, and so construed clearly does not apply to the operations of a telegraph company.

The only child labor provision which survived was as follows:

> "Section 12 (a). After the expiration of 120 days from the date of enactment of this act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed * * * ".

Reading this language in its natural sense, no group of persons operating a telegraph enterprise could possibly have supposed that it was intended to affect their business. No telegraph company counsel could have advised his executives that it was so intended; no telegraph executive could have believed his counsel if he had been so advised.

Congress "is presumed to have used a word in its usual and well-settled sense", *U. S.* v. *Stewart*, 311 U. S. 60, 63 (1940). There is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes", *U. S.* v. *American Trucking Associations*, 310 U. S. 534, 543 (1940). "The legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context", *Levy's Lessee* v. *McCartee*, 6 Pet. 102, 110 (1832). Words are used as understood in "common speech", *Sonn* v. *Magone*, 159 U. S. 417, 421 (1895); in "the usual, ordinary and everyday meaning" of the terms, *Old*

Colony Railroad Co. v. *Commissioner*, 284 U. S. 552, 561 (1931); and "are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken", *U. S.* v. *Thind*, 261 U. S. 204, 209 (1922).

The reason for this rule of statutory construction is that public statutes are addressed to the community at large, and being designed to constitute a rule of conduct for such community, must have been written so as to be understood by those to be guided thereby, *Maillard* v. *Lawrence*, 16 How. 251, 261 (1853).

The courts must ascertain the intent of the law-maker "to be found in the language that he has used", *U. S.* v. *Goldenberg*, 168 U. S. 95, 102 (1897) and must prefer the plain, obvious, and rational meaning of a statute "to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover", *Lynch* v. *Alworth-Stevens Company*, 267 U. S. 364, 370 (1924).

The broad scheme of the Black-Connery bills as first introduced was to enumerate and define certain conditions of employment which were deemed to be objectionable and (1) to prohibit employment in commerce, or in the production of goods for commerce, under any of those conditions and (2) to ban from commerce goods so produced. It was the universal understanding in Congress that the prohibition as to employment *in commerce*, except as to the specific exemptions, covered the great railroad systems and other interstate public utilities engaged, not in producing goods, but in rendering services, while the prohibitions with respect to employment in production of goods and shipment of goods applied, not to services, but to things designed for sale to a consumer.

In *McLeod* v. *Threlkeld*, 319 U. S. 491 (1943), the question was whether cooks employed by a contractor, who furnished meals to maintenance-of-way employees of an interstate railroad, were within the minimum wage provisions of the act, which apply to (1) employees engaged in commerce and (2) employees engaged in the production of

goods for commerce. The court, in approaching the question, first cleared the atmosphere by pointing out that the only thing to be determined was whether the employees were in the first class, namely, actually engaged in commerce:

> "McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lay completely outside that clause. Our question is whether he was 'engaged in commerce'."

A footnote points out that cooks employed to feed workers engaged in the production of goods for commerce have been held to be similarly engaged.

Railroads make and repair equipment which actually moves physically in commerce. Nothing of that sort occurs in any telegraph operating room. It would have been far less of a strain of the meaning of language to hold that railroads were producing goods for commerce than to hold that telegraph companies are.

But it would not help the plaintiff if it could be held that telegraph companies are producing goods for commerce. For there is no prohibition of the employment of child labor either in commerce or in production of goods for commerce; the only prohibition is against the shipment in commerce of goods produced in a child-labor establishment within the previous thirty days.

The Artificial Definitions

Probably the suit would not have been brought, and certainly the lower courts would not have agreed with the plaintiff, if it had not been for the artificial definitions of "goods" and "produced". Those artificial definitions are as follows:

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities,

> merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof".
>
> "'Produced' means * * * in any * * * manner worked on * * * ; and * * * an employee shall be deemed to have been engaged in the production of goods if such employee was employed in * * * handling, transporting or in any other manner working on such goods * * * ".

But there is no artificial definition of "ship" or "shipment"; and since shipping and delivery for shipment are the only things with respect to child labor which are prohibited, and since these words in their natural sense cannot possibly apply to the transmission of intelligence by wire, the plaintiff's case fails at its vital point.

Telegrams Are Not "Goods"

The argument is that telegrams come under the artificial definition because they are "subjects of commerce", and of course they are. But what "goods" Congress meant must be determined not only from the definition but from the nature of the prohibition and the object which was to be accomplished. The goods with which Congress was concerned were goods (1) with parts or ingredients; (2) which are to be delivered into the actual physical possession of a consumer; and (3) which in their nature are susceptible of being shipped. A subject of commerce which fulfills none of these requirements may be goods, but cannot be the sort of goods which Congress had in mind.

We insist on no distinction between tangible and intangible subjects of commerce. It may well be that the insertion of "subjects of commerce of any character" was intended to make it clear that the prohibition applied to intangibles as well as tangibles. We do not dispute that

the production and sale of gas or power might come within the act.[28] **But it is plain that what Congress had in mind was some *res*, tangible or intangible, which is produced, transported and sold to be consumed, in competition or potential competition with other sales of similar products.** Only in that way can the clear intention of Congress to prohibit only competitive advantages in interstate trade be realized.

"A statute must be read in the light of the mischief to be corrected and the thing to be attained." *National Labor Relations Board* v. *Hearst Publications*,[29] 64 S. Ct. 851 (April 24, 1944). Citing many cases.

A Telegraph Company Is Not a Producer

It is not contended that Western Union is a manufacturer or dealer. It comes within the act (it is claimed) if it is a producer or not at all. No one would say that it is a producer except for the artificial definition, according to which

> "'produced' means * * * in any * * * manner worked on"

and an employee is deemed engaged in production of goods if he is employed in

> "handling, transporting or in any manner working on such goods."

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[28] A gas or electric company which performs a utility service in transporting of transmitting its product, but also manufactures and sells the product itself, has a dual character, as the court has recently pointed out in connection with rates, and it is possible that the prohibition might apply to the production and sale of the commodity or res but not to the utility service, so that for employing child labor in production the company might be enjoined from delivering its own product but not from transporting or transmitting the product of another company. We need not perhaps further speculate as to this; we mention it only because the question was briefly raised by a member of the court during the argument below.

[29] Holding newsboys to be employees of the newspapers.

But again a statute must be read in the light of the mischief to be corrected and the thing to be attained. These definitions were not inserted in the act exclusively or even primarily with reference to child labor. Employment in violation of the wage and hour provisions of the act was prohibited not only in commerce but in the production of goods for commerce. Had it not been for the artificial definition, if A manufactured material and gave it to B to process or package, B might well have said that the goods were not produced by him. The function of the definition is obviously to preclude that claim.

That it cannot apply literally in every case arising under the act is evident. If it did, let us see what the consequences would be. Every carload of freight transported by a railroad company is "produced" by the railroad company, since it is handled or worked on by the railroad company. Section 15 (a) makes it unlawful

> "to transport * * * or to ship * * * any goods in the production of which any employee was employed in violation of section 6 or section 7" (the wage and hour provisions of the act) "* * * except that no provision of this act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods *not produced by such common carrier* * * *".

But if everyone who handles goods is *always* a producer, every carload of freight handled by a railroad company is produced by the railroad company, and there could therefore be no such thing as freight which the railroad company handling it did not produce. So if a railroad employee handling freight were paid less than the minimum wage prescribed by section 6 the railroad company could never transport that freight, and if a railroad employed child labor in its establishment no "goods" "produced" anywhere in its establishment (which would include all freight handled by it) could be shipped across any State line anywhere for thirty days.

The mere statement is enough to show that the artificial definition of "produced" was intended to apply only to the prohibitions with regard to employment in production and the subsequent shipment of goods produced in violation of those prohibitions, but never to the service operations of a public utility company handling what in the ordinary meaning of the term is the product of its customers or patrons.

A telegraph company does not "ship" its telegrams

The transmission of telegrams is not within the sweep of a statute dealing with the transportation or shipment of goods unless telegraph companies are expressly mentioned by name

There is no artificial definition of "ship". The word is used in its natural sense.

For ninety years the Congress and the State legislatures have been legislating about telegraph companies, and we know of no single instance in which their business has been held to be included in the term "transportation", or where they have been held included in the term "carriers", except where the specific statute has contained a definition bringing them within the particular act. For instance the original Interstate Commerce Act was passed in 1887. Nobody supposed that it applied to telegraph companies, and it did not. This court held in *Primrose* v. *Western Union*, 154 U. S. 1 (1894), that telegraph companies were not common carriers. This court, like other courts, held that in many respects their functions were analogous to those of common carriers, in that they could not lawfully discriminate in their charges or practices and were bound to charge reasonable rates. On the other hand they were unlike common carriers in that they were permitted to limit their liability for negligence. In 1910 they were brought under the Interstate Commerce Act by an

amendment (36 Stat. 539) providing that they should be deemed to be common carriers "for the purposes of this act"; and when they were separated from the railroads for the purpose of regulation by the Communications Act, the Communications Act (48 Stat. 1064) defined them as carriers or common carriers, "for the purposes of" that Act. But they are not carriers, either common carriers or contract carriers, for any other purpose. Telegrams are transmitted, never shipped. Even the physical piece of paper containing the message, which may move in commerce from the last telegraph office to the addressee, cannot possibly be said to be "shipped" in commerce. A person not a carrier transporting his own property across a State line or otherwise does indeed transport it but certainly does not ship it.[30] If Congress had actually intended to include telegraph messengers in the act, a court should require more appropriate language than this before applying criminal sanctions, or the civil sanction of complete interruption of the industry. We repeat that before the lower courts spoke no counsel could reasonably have advised a telegraph executive that this language applied to him, nor could a reasonable executive have believed his counsel if he had been so advised.

Under all the thousands of laws and regulatory orders dealing with the transportation of goods there is no other instance in which any court or administrative tribunal has held that telegraph companies fall within prohibitions addressed to carriers of goods except where they are specifically stated to be included.

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[30] The Oxford Dictionary gives, as one of the meanings of "ship", the following:

> "To transport (goods) by rail or other means of conveyance. U. S."

But the only two illustrations given are "to ship their freight by rail" and "we * * * shipped our * * * collection of luggage to the hotel". It is proper to say that a vessel ships a cargo and perhaps that a railroad ships a carload of freight; but the term cannot properly be so used of any one except a carrier.

In *Consumers Import Co.* v. *Kabushiki, et al.*, 320 U. S. 249, 252 (November 8, 1943), in construing the Marine Fire Statute, this court said:

> "The provision here in controversy is section 1 of the act of March 3, 1851. Despite its all but a century of existence, the contention here made has never been before this court."

The same may be said, during all but a century, of the contention that a statute referring to transportation of goods includes the transmission of messages, or that a statute relating to the production of goods has any application to the telegraph business.

Although the right to recover for payment of less than minimum wages is remedial, *Overnight Motor Company* v. *Missel*, 316 U. S. 572, 583 (1942), the statute as a whole and the whole of the child labor provision are penal, and in derogation of the common law. *United States* v. *Darby*, *supra*. In such cases especially courts cannot "safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, because of a *supposed* public policy or purpose", *Sarls* v. *United States*, 152 U. S. 570, 575 (1894). An ambiguous criminal statute must not be extended, by construction, to embrace cases not *clearly* within it, *Krichman* v. *U. S.*, 256 U. S. 363, 368 (1921).

In *McBoyle* v. *U. S.*, 283 U. S. 25, 26-27 (1931) it was held that the National Motor Vehicle Theft Act, although defining motor vehicles to include "an automobile, an automobile truck, an automobile wagon, motorcycle, or any other *self-propelled vehicle*, not designed for running on rails", did not apply to aircraft:

> "No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air * * *. But in everyday speech 'vehicle' calls up the picture of a thing moving on land. * * * For after including automobile truck, automobile wagon and motorcycle, the words 'any other self-propelled

vehicle not designed for running on rails' still indicate that a vehicle in the popular sense, that is a vehicle running on land, is the theme. It is a vehicle that runs, not something, not commonly called a vehicle that flies. * * *

"Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used."

Similarly, district courts have consistently held that "vessel", as used in admiralty statutes, even when defined to include "every description of watercraft or other artificial contrivance used, or capable of being used as a means of transportation on water," does not include a flying boat or seaplane. *Dollins* v. *Pan-American Grace Airways*, 27 F. Sup. 487 (1939); *Noakes* v. *Imperial Airways*, 29 F. Sup. 412 (1939); *U. S.* v. *Peoples*, 50 F. Sup. 462 (1943).

Neither district court nor circuit court of appeals gave any reason for concluding that telegrams are "shipped"

The district court (Judge RIFKIND) found this question "troublesome". But it is evident from his opinion that he had permitted the plaintiff to persuade him that the design of the act finally passed was the same as that of the framers of the House bill, namely, to effectuate some broad national policy with respect to child labor which Congress (unlike the House) was too bashful expressly to declare. Congress, he thought, wished "to keep the streams of interstate

commerce undefiled by the products of child labor" (R. 22). Even this we cannot concede. Goods produced in an establishment employing child labor but not themselves produced by child labor could not defile commerce, and it is clear that Congress did not think that commerce itself was defiled by children working in commerce, or the prohibition against children working in commerce would no doubt have been retained. Moreover, child-labor-establishment goods are not forever barred from commerce like stolen automobiles or lottery tickets, or even like goods produced in violation of the wage and hour provisions of the act; they can be shipped in commerce as freely as other goods thirty days after the child labor ceases. The purpose of Congress, as distinguished from the House, was a very different one: it was to prevent the employer of child labor from having a competitive advantage in interstate trade as against the employer of labor in another State who refrains from employing children, either voluntarily or because of stricter State laws. But in dealing with the "troublesome" question of the meaning of "ship" the district judge admits that "ship" is not the proper word. He erroneously states that this court has held that telegraph companies are engaged in "transportation" (R. 22).[31] Ship, he says, is the correct word with respect to movements by rail, by air or truck (R. 22); and so, without more, he leaps to the conclusion:

> "I do not think that Congress intended to *limit* the application of the act to the conventional modes of shipment" (R. 22).

In other words it was plainly his idea that the act had a broader purpose than was indicated by anything in its language and that we are trying to limit it, whereas our position is simply that there was no such broad purpose ex-

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[31] The court of appeals says that: "there is not the least similarity between what the defendant does and the transportation of goods by a common carrier". (R. 36).

cept in the mind of the House, and that to that Congress refused to agree.

The circuit court of appeals fell into the same error. "No reason", they say, "is suggested for such a capricious *limitation upon a purpose which was apparently pervasive*" 141 F (2d) 403. The act, they say, "was a compromise of two quite separate designs; that of the House, which was to regulate child labor by national standards; that of the Senate, which was to prevent one State from breaking down the standards of another by unregulated competition. The House won, and it would leave its plan in large part unrealized to omit child labor in interstate commerce * * *" (*ibid*).

It is perfectly true that it would leave *its* plan—the House's plan—in large part unrealized to omit child labor in interstate commerce; but the House's plan was repudiated by Congress, and on this particular point, as we have abundantly shown, the House did not win but the Senate did. And the court has correctly stated the design of the Senate, which Congress determined should prevail. The inconsistency of the court's attitude is shown by the fact that it concedes that child labor in commerce is not prohibited; indeed the plaintiff concedes it and always has; and the plaintiff did not seek and the court did not grant an injunction against the continued employment of child labor by the defendant.

Finally we quote the reason given by the court of appeals for holding that the word "ship" applied to telegrams. They realized that this point was essential to the judgment. It must be assumed that the reason they gave—the only reason they gave—was the best one they could think of. This was it:

> "Last, we have to say whether, assuming that a message received for transmission is 'goods' and that the defendant 'produces' it, it also 'ships' the message, when it sends the pulsations over the telegraph wires. Although that is indeed an inappropriate word to apply to 'intangibles', its unfitness for

> the most part disappears, once we treat messages as 'goods'. Certainly we should stultify ourselves, having gone so far, if we were to refuse to understand it as covering what is here involved."

This reason does not seem to us to be a good one. They first hold that messages are goods, in the face of the objection that Congress had in mind only the sort of goods that are shipped, and that messages are not shipped. And they follow with the conclusion that although the word "ship" is inappropriate, its unfitness "for the most part" disappears when they have determined that messages are goods. The question is whether the man in the street—or in the operating room—should have understood from this language that Congress meant telegrams. We can think of no better example of attributing to words used in an act of Congress a "curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover" such as was condemned in *Lynch* v. *Alworth-Stevens Co., supra.*

The district court's reference to the exemption of child actors and the failure to exempt telegraph messengers

Child actors were expressly exempted from the child labor provisions. Had they not been, it might have been argued that traveling theatrical companies, which "produce" various "goods" in the regular course of their business, could not travel across State lines. The argument might not have been sound. But the stage carpenter produces various props, and costumes are made and altered; photographs of the cast are taken, and there are various other activities of this sort which might come within the definition of production of goods.

As to telegraph messengers, no one suggested their exemption because no one had any idea that they were in any way affected, once the prohibition of child labor in commerce was left out. The district court's idea, as already

pointed out, was that there was a general policy of prohibition of child labor, and that the defendant was seeking to have this limited; whereas our position was, quite simply, that Congress did not intend to prohibit anything except what it prohibited.

III

It is clear from the Act as a whole that Congress did not regard communications (although subjects of commerce) as goods, their handling as production or their forwarding as shipment.

(1) If telegrams were goods the telegraph company would be required to refuse to accept, from any customer, a message produced by child labor or by labor employed in violation of the wage and hour provisions of the act.

"Goods" produced by child labor or by employees employed in violation of the wage and hour provisions of sections 6 and 7 may be given to a common carrier for shipment, and the producer violates the act by so doing; but the common carrier must take the goods and deliver them: no provision of the act "shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this act shall excuse any common carrier from its obligation to accept any goods for transportation" (section 15 (a) (1)).

A telegraph company is not a common carrier, and it does not transport goods in the ordinary course of its business. If messages are "goods", and if every message that is sent is "shipped", what happens if the sender of a telegram has dictated it to a secretary who is under sixteen, or who is employed in violation of the wage or hour provision?

Obviously the exemption applicable to carriers does not protect the telegraph company. Still more obviously it was not the intention of Congress to require the telegraph

company to refuse to permit the "shipment" of the message—the "goods"—for any such reason. If the telegraph company must accept and transmit the message, even though it has full knowledge of the circumstances, it can be for no other reason than that Congress did not regard messages as goods and did not regard their transmission as a shipment.

(2) If plaintiff's construction were correct, the employer of child labor could never send any interstate telegrams at all, or even use the mail.

If the message is goods, and the sending of it by a telegraph company is a shipment, giving it to the telegraph company to send is a shipment or certainly a delivery for shipment, and if there is child labor anywhere in the sender's establishment, whether connected with the production of the message or not, such shipment is forbidden for thirty days after the child labor ceases. It is difficult indeed to see how, on this theory, the child-labor establishment could even be permitted to use the mails. If a telegram is goods a letter must be; if a telegram is shipped a letter must be shipped when it is put in the post.

(3) Neither (if plaintiff were correct) could the telegraph company send telegrams about its own business, ship its poles or office supplies, or use the mail.

The point is self-explanatory. If the telegraph company may not lawfully send another person's message it certainly may not lawfully send its own. If there is child labor in its establishment no goods of any kind produced (handled) in that establishment may be shipped in commerce for thirty days.

(4) The provision for employment of telegraph messengers at less than minimum rates indicates the expectation of Congress that telegraph companies would continue to employ young boys.

There can be no doubt that Congress had in mind and gave some consideration to the problems presented in connection with the employment of telegraph messengers.

Section 14 provides:

> "Learners, apprentices and handicapped workers:
> "The administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, *and of messengers employed exclusively in delivering letters and messages*, under special certificates issued pursuant to regulations of the administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the administrator shall prescribe * * *".

The italicized words were inserted by the Conference Committee, and had not appeared in any of the previous drafts of the bill. They were of course inserted at the request of the telegraph companies. Congress, since it had in mind this occupation, undoubtedly also had in mind, what everyone knows, that a substantial proportion of the total number of telegraph messengers had always been boys under the age of sixteen. Fifteen is probably the optimum age for a messenger from the point of view of management: "messenger" and "messenger *boy*" were practically controvertible terms; and these younger boys, not having the responsibilities of heads of families, and being capable of performing messenger duties as well as older boys and often better because of their alertness and the fact that they did not expect immediate promotion, had always been available in the labor market at rates of pay generally less than the minimum of twenty-five cents an hour provided for in the original act. The telegraph companies had not fully

recovered from the prolonged depression, and the fear that they would necessarily have to curtail employment if obliged to pay the statutory minimum at once was thought by Congress to have a possible foundation.

The point is that the special treatment of telegraph messengers was due primarily to their youth. It was not because they were learners or apprentices, for learners and apprentices were otherwise expressly provided for. After a few months of experience a messenger is probably as efficient a messenger as he will ever become; the reason why the way was left open to employ him at less than the minimum was because he often was, and Congress expected that he often would be, young.

(5) It is unthinkable that Congress could have intended to authorize a court, by injunction, to close down completely the operations of a nation-wide public utility.

Child labor in commerce is not prohibited. The plaintiff concedes that she is not entitled to an injunction restraining the defendant from continuing to employ messengers under sixteen. No such injunction was asked for or granted. The only civil relief authorized by the act for a violation of the child labor provisions is an injunction restraining further violations, that is, an injunction restraining the shipment of goods produced in the establishment where child labor has been employed until thirty days after the child labor has ceased. In this case the injunction asked for and issued—and the only injunction that could have been issued—was an injunction against transmitting interstate messages (R folio 121-22). Even if the law means what the plaintiff says it means, we urge in the concluding point that to pass such a decree was error. But here we merely urge that the fact that this is the civil remedy, and the only civil remedy, provided by Congress for the violation of the child labor provisions shows plainly that it never entered the mind of Congress that the child labor provisions applied to the operations of a telegraph company, or indeed

to the purely service operations of any other public utility. The plaintiff's construction of the act would authorize an injunction closing down the Pennsylvania Railroad as well as the Western Union if the railroad employed child labor to help load a car of freight. An act of Congress is not to be construed as authorizing such consequences even if words appropriate to express such an intention were used.

IV

The construction of the act contended for by plaintiff would raise serious doubts as to its constitutionality, and should therefore be rejected even if the intent of Congress were doubtful.

We have referred to the doubts entertained by lawyers in the Senate in 1937 as to whether a direct prohibition of child labor in commerce would have been constitutional. The circuit court of appeals, informed with the wisdom of 1944, thought that such a prohibition would clearly have been constitutional, and probably no time should be spent in arguing this question. But we think that even today the result might possibly be affected by the presence or absence of a finding and declaration of policy by Congress that child labor has some tendency to obstruct or interrupt or impair the efficiency of commerce—a finding and declaration which Congress struck out of the present law.

Hammer v. *Dagenhart* was overruled in *United States* v. *Darby*, 312 U. S. 100 (1941), and at the same time the wage and hour provisions, as applied to employment in the production of goods for commerce, were sustained as valid regulations of commerce. But the Attorney General in his argument (312 U. S. at page 104) laid great stress on the Labor Board cases, and on the fact that Congress has found that the *wage and hour provisions* of the act "will diminish the obstructions to interstate commerce which flow from labor disputes"; and the opinion of the court also

stresses (page 109) the court's judicial knowledge of the purpose of the act because of the declaration of policy, which is quoted in full.

In the absence of any finding or declaration of policy it might still be reasonably argued that a court cannot take judicial notice of any facts tending to show that commerce is threatened with obstructions or interruptions by the continued employment of boys under sixteen in capacities in which they have long been regarded as adequate; and there is no question of their employment by a telegraph company resulting in unfair competitive advantage to anyone in interstate trade. The constitutional question therefore still exists.

The construction of the act contended for by the plaintiff produces, and the plaintiff insists that it should produce, the same results in practice which would have flowed from the direct prohibition which Congress was asked, but refused, to enact, except that the direct prohibition, if enacted and if constitutional, could have been enforced by a normal civil remedy, while the only civil remedy to which plaintiff is entitled under her construction of the act is an abnormal and impossible one. The abnormality of the remedy does not help to remove the constitutional doubt. A construction which leaves constitutionality uncertain must on well-settled principles be rejected even where there is room for argument as to the actual intent of the lawmaker, which is not the case here.

V

The decree enjoining Western Union from sending interstate messages was in any event erroneous.

If the law were with the plaintiff the lower courts should still have refused an injunction. The normal course in that event, we suggest, would have been to deny the injunction but retain jurisdiction of the cause, with the intimation

that it would be assumed that the defendant would obey the law, once the law was settled.

Undoubtedly this is what the defendant would do. But so far as the present civil suit is concerned, retaining jurisdiction of it would be an idle gesture; for an injunction forbidding defendant to transmit interstate messages would be no more permissible six months hence than now. If the law were determined to be with the plaintiff there are other methods of enforcing compliance, resort to which, however, would never be necessary. The decree for this reason alone should be reversed.

Conclusion

The decree should be reversed and the complaint dismissed.

Respectfully submitted,

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APPENDIX

APPLICABLE PROVISIONS OF THE FAIR LABOR STANDARDS ACT OF 1938 (52 Stat. 1060)

Section 2 (29 U. S. C. A., Sec. 202):

"(a) The congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of sections 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

Section 15a-4 (29 U. S. C. A. Section 215a-4) prohibits the violation of "any of the provisions of Section 12" (29 U. S. C. A. Section 212), the operative words of which are:

" * * * No producer, manufacturer or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which, within thirty days prior to the removal of such goods therefrom, any oppressive child labor has been employed; * * * " (Section 12a; 29 U. S. C. A. Section 212a)

"Section 3 (i). 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical

possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"Section 3 (j). 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

"Section 3 (l). 'Oppressive child labor' means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; " * * *. (29 U. S. C. A. Section 203)

"Section 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 206 of this title and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe," * * * (29 U. S. C. A. § 214)

"Section 15. No provision of this act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provisions of this act shall excuse any common carrier from its obligation to accept any goods for transportation." * * * (29 U. S. C. A. Section 215)

"Section 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., 1934 edition, Title 28, Sec. 381), to restrain violations of section 215 of this title." (29 U. S. C. A. § 217).